REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 37/2016

DAVID KIMANI GITAU……..... APPELLANT

VERSUS

FRANCIS WAINAINA……..... RESPONDENT

JUDGMENT

1. Like many judgments in many burial disputes, this one merits the opening sentence: This is a sad case. Mary Wanjiku Wainaina (“Mary”) died on 16/07/2016. Her body was taken to the Kenyatta University Mortuary and Funeral Home (“Mortuary”).

2. Mary’s death unleashed the current dispute. On 22/07/2016, her father, Francis Wainaina (the Plaintiff) took out summons and, contemporaneously with it, filed a Notice of Motion Application under certificate of urgency suing David Gitau Kimani (the “Defendant” or “Appellant”). The Plaintiff sought interim orders injuncting the Defendant from taking away the remains of Mary from the mortuary and interring it.

3. The Plaintiff’s case as stated in his plaint was straightforward: Mary was his daughter; she was, according to him, unmarried to the date of her demise. As such, he, as her father had the sole and exclusive right to inter her remains. The Plaintiff, therefore, sought a declaration that he had a superior right to inter the remains of Mary and, consequently, an order restraining the Defendant from taking Mary’s body, interring it or in any other manner interfering with his exclusive right tointer the remains. He further sought an order directing Kenyatta University Mortuary not to release the remains of Mary to any person other than himself. In particular, he sought a permanent injunction against the Defendant from receiving or interring the remains.

4. The Defendant responded by defending the suit. Through his lawyers at the time, he filed a Defence and appeared for the hearing of the Plaintiff’s Notice of Motion seeking interim orders. In short, the Defendant’s narrative is that he is husband of Mary and, therefore, he enjoys a superior right to inter her remains. Needless to say, the Plaintiff vehemently contests this claim and insists that Mary was never married. This, really, is the crux of the case. As demonstrated below, the way the case unfolded introduced added complications.

5. As aforesaid, the Plaintiff filed a Plaint, a Certificate of Urgency and a Notice of Motion all dated

22/07/2016 simultaneously. On that same date, the Plaintiff's lawyer appeared *ex parte* before the Learned B.J. Bartoo, Resident Magistrate and obtained orders restraining the Defendant from receiving, taking away and or removing the body of Mary from the Mortuary or interring the same pending the *inter partes* hearing and determination of the Application. The case was scheduled for *inter partes* hearing on 25/07/2016.

6. The Defendant was served with the suit documents shortly thereafter because he and his legal representative were present on 25/07/2016. It is not entirely clear what transpired on 25/07/2016. It would appear that Mr. Nguringa presented himself in Court as appearing for the Defendant and was recorded as such. He requested for more time to file a reply. In response, the Court extended the orders for the preservation of the body. The Court then gave the following directive:

The Respondent to bring their reply together with its defence. Parties to prepare for hearing on 28/07/2016 of the main suit.

7. On that same day (25/07/2016), Ishmael & Co. Advocates went ahead and filed a Memorandum of Appearance on behalf of the Defendant. They also filed a Defence on 27/07/2016 as well as a List of Witnesses, Defendant's Statement, Three witness statements and three letters the Defendant intended to rely on in his defence of the suit. The Defendant also filed a stack of 12 photographs and a list of authorities. There was no Replying Affidavit or Grounds of Opposition to the Notice of Motion filed.

8. It would appear that the Learned Honourable Bartoo was not sitting on 28/07/2016 for the matter was placed before the Learned Honourable C.A. Muchoki who extended the interim orders and set down the hearing for 01/08/2016.

9. On 01/08/2016, when the matter was called out, both Mr. Nyongesa for the Plaintiff and Mr. Nguringa for the Defendant indicated that they were both ready to proceed and that they each had three witnesses. The matter was then assigned a hearing slot of 11:30am. At that later time, it proceeded – with the Plaintiff and one other witness testifying before Mr. Nyongesa closed the Plaintiff's case. The Defence was then asked to present its case and Mr. Nguringa called the Defendant who testified after which Mr. Nguringa, despite having indicated that he had three witnesses, closed the Defence case.

10. The case was then set for submissions on 03/08/2016 – two days later. It would appear that on 03/08/2016, the parties appeared and filed their written submissions. Judgment was scheduled for, and was, in fact delivered on 18/08/2016. The Learned Magistrate found the Plaintiff's case proven and issued a declaration that the Plaintiff has exclusive right to inter the remains of Mary. The Court also ordered the Defendant to be restrained from interring the remains of Mary and directed the Mortuary to release the remains of Mary to the Plaintiff. The Court also awarded costs of the case to the Plaintiff.

11. Some back and forth happened regarding an application for stay of the judgment caused in part by the fact that the Defendant changed his advocates in-between and a technical objection was raised by the Plaintiff as to the propriety of the new advocate to address the Court on the application for stay. Suffice it to say that eventually, the Defendant's new advocates filed an application for stay in this Court and, ultimately, a decision was taken to expedite the hearing of the appeal. By that time, the remains of

Mary had been interred pursuant to the order of the lower court and, arguably (as this is a subject of a pending application for contempt) before the order could be served on the Plaintiff.

12. I have gone into this history of the hearing in the lower court because one group of grounds of appeal in the Amended Memorandum of Appeal concerns this procedural history. In particular, the two grounds of appeal read as follows:

1A. THAT the Learned Magistrate erred in law and fact in proceeding to hear this matter with haste without allowing closure of pleadings, taking pre-trial directions and allowing adequate time for the defendant to amend his pleadings and/or prepare and present his evidence and further proceeded to ignore the evidence presente[ed] by the defendant.

1B. THAT the Learned Magistrate erred in fact and in law in ordering the matter to proceed for full hearing when the same came up for hearing of the plaintiff's application dated 22nd July 2016 and by so doing blocked and/or did not avail the defendant adequate time to prepare and present his case.

13. During the oral hearing of the appeal, Mr. Mwangi appearing for the Appellant (Defendant) spend much time on this ground of appeal arguing that the way the Learned Magistrate proceeded with the matter wrought substantial injustice to the Appellant because it denied him an opportunity to prepare and present his case. In particular, Mr. Mwangi was quite critical of the way the Learned Magistrate transformed a hearing for the Notice of Motion Application into a hearing for the main suit even before parties had closed their pleadings. He argued that no pre-trial motions were taken and no efforts were taken to prepare the case for hearing. He argued that this occasioned great injustice to the Appellant who was not even able to call his witnesses, properly present his case or press his counter-claim. Mr. Mwangi urged the Court to either find that Plaintiff had not proved its case or, at worst, remand the case for proper hearing.

14. On his part Mr. Nyongesa for the Respondent was satisfied with how the case had proceeded in the Court below. He defended the Lower Court's handling of the case arguing that the circumstances called for the Court to be flexible in its handling of the procedural aspect of the case. Pointing out that this Court had taken similar steps to expedite the hearing of the appeal, Mr. Nyongesa argued that no injustice was occasioned to the Defendant by the expediting of the case. Instead, the Court had enabled the parties to get expeditious justice given the nature of the case. Mr. Nyongesa pointed out that both parties had agreed to participate in the trial and the Defendant had not objected to the trial.

15. Mr. Nyongesa also pointed out that the pre-trial procedures detailed out in the law – including Order 11 – is not a compulsory formal process which must be strictly followed in all cases. Instead, the Court is permitted, when circumstances permit, to skip some processes and procedures where the call of justice demands otherwise. Not having pre-trial procedures, therefore, cannot *per se*, be a reason to reverse a trial court's determination of a case. Mr. Nyongesa argued that when the matter came up for hearing on 25/07/2016 the advocates mutually agreed that owing to the nature of the matter the parties would dispense with the application and proceed to full hearing.

16. I would begin with a general agreement with Mr. Nyongesa's point: pre-trial procedures, like all rules of procedures, are the handmaidens of justice and not its mistress. Hence, they are not formulaic or talismanic steps which must be rigidly followed regardless of their utility to the trial process. Indeed, Order 11 of the Civil Procedure Code exists to ensure that the trial process is more efficient. Hence, a Court may, where circumstances and context permit or dictate skip, abbreviate or bespoke the pre-trial processes and procedures. The nature of this particular case indicates that this case might be a good candidate for that.

17. However, even where a Court has determined that the dictates of justice require a customization of or an altogether skipping of pre-trial conference, the trial schedule or scheduling order and timeline which a trial court must adopt must be one which ensures procedural fairness to the parties. A Court is not entitled to sacrifice due process to exigencies of circumstances and expedition.

18. In this case, there is reason to worry that the Appellant became a victim of the abbreviated process adopted by the Court. When the Appellant and his advocate appeared in Court on 25/07/2016, he had barely been served with the suit papers. His advocate sought for time to file replying papers for the Notice of Motion Application dated 22/07/2016. This was, at maximum, a mere two days after he had been served with the suit papers. Instead of the Court extending the time for the Appellant to file replying papers for the Notice of Motion Application, the Court set the date for hearing and instructed the Appellant to file their Defence and show up for the hearing of the main suit six days later – on 01/08/2016. While Mr. Nyongesa says the advocates mutually agreed to dispense with the Application and proceed to full hearing, the Court record does not show any such agreement. Indeed, the Court record is silent on what happened to the Application dated 22/07/2016. It is not withdrawn, dispensed with or marked as settled.

19. It is obvious that the Court was moved by the need to proceed with speed given the fact that this was a burial dispute and the body was in the mortuary awaiting the resolution of the case. However, the Court's orders resulted in three situations. First, the Appellant was forced to scramble to file a Defence within a super-abbreviated period – and the brevity of time is betrayed by the general nature of the Defence filed. Second, and perhaps more seriously, the Court's orders constrained the nature of defence and case the Appellant was able to marshall. Hence, when the Learned Magistrate remarks later in her judgment that "there being no credible competent witness who can give testimony of high probative value that the two conducted themselves and were regarded by the members of the public as husband and wife….I find the evidence inadequate and it fall (sic) short of proving an alleged (sic) marriage", it is precisely because the Appellant had not had the opportunity to call such witnesses. The inadequate time to prepare for this case would also explain the lack of counter-claim despite the nature of the case disclosed in the Defence's testimony.

20. Hence, while it was commendable for the Court to be flexible and to try and expedite the hearing, it behooved the Court to stipulate a scheduling order and trial timeline that while abbreviated, they accorded each party procedural due process to develop its case sufficiently before the case was set down for hearing. In the end, therefore, the trial was not fair and led to an oppressive procedure and outcome for the Appellant who did not have adequate opportunity to develop the record and prepare for trial. Consequently, the judgment must, for this reason alone, be set aside. In the circumstances, then,

the only fair outcome out of this appeal would be to remand the case back to the lower court for hearing since it would be a miscarriage of justice for this Court to attempt to come to conclusions of fact or law based on a record resulting from what I can describe as a “still-birth trial” at the lower court.

21. The decision to remand the case for full development of the record and re-trial is made more inevitable by the subject matter of this case. While presented as a burial dispute, at bottom, the determination that the Court must make is whetherthe Appellant and the deceased (Mary) were husband and wife. This is a consequential decision which should only be made after the parties have full opportunity to present their respective cases.

22. Given my decision to remand the case for retrial, I will refrain from commenting on the other legal issues argued by the parties on appeal. Indeed, the less I say about the other aspects of the case, the better. I would, however, guide the Trial Court to re-open the case at the pleading stage and then schedule the case for hearing on a priority basis.

DISPOSITION

23. The case is remanded to Thika Chief Magistrate’s Court for re-trial. The parties shall appear before the Chief Magistrate on Monday, 31/10/2016 for directions. The Chief Magistrate shall allocate the case file to a magistrate other than the Learned B. J. Bartoo who had initially heard the case.

24. The costs of this application shall abide by the outcome of the case as re-tried.

Dated and delivered at Kiambu this 25th day of October, 2016.

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JOEL NGUGI

JUDGE

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